U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 January 2005

BALCA CASE No.: 2004-INA-50
ETA Case No.: P2002-CA-09523570/JS

In the Matter of:

GREGORY'S RESTAURANT,
Employer,

on behalf of

SANTIAGO SANDOVAL,
Alien.

Appearance: Peter Morgan, Agent
Santa Clarita, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Gregory's Restaurant ("the Employer") filed an application for labor certification[1] on behalf of Santiago Sandoval ("the Alien") on March 19, 2001 (AF 28).[2] The Employer seeks to employ the Alien as a restaurant cook. This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

The Employer described the duties of the position which it was seeking to fill as preparing American and Italian foods, cooking and seasoning food, portioning and garnishing plates, serving food on order, planning menus, estimating food consumption, and purchasing supplies. (AF 28). The Employer required no advanced education and required two years of experience.

In the Notice of Findings ("NOF"), issued November 27, 2002, the CO found that the Employer did not demonstrate that U.S. workers were rejected for lawful job-related reasons, in violation of 20 C.F.R. § 656.21(b)(6). Specifically, the CO stated that a U.S. applicant was qualified because his resume showed more than the required amount of experience. The CO noted that the Employer attempted to contact the applicant by certified return receipt letter requesting the applicant to contact the Employer within ten days of receiving the letter. The Employer stated that the letter was returned, marked "unclaimed." The CO noted the returned letter was not included in the documentation. The Employer was directed to submit rebuttal which documented how the U.S. worker was recruited in good faith in a timely manner and rejected solely for lawful, job-related reasons.

In its rebuttal, dated August 23, 2003, the Employer stated that the postal service attempted to deliver the letter twice and returned the envelope to the sender. The Employer also stated that the original envelope with the Postal Service return receipt attached to the back of the envelope was sent to EDD with the final documentation, and a copy was submitted on rebuttal. In addition, the Employer stated that the U.S. applicant was called on April 20, 2003 at 3:00 p.m. and again on April 23, 2003 at approximately 4:00 p.m. and no one answered the telephone. (AF 15-23).

The CO issued the Final Determination ("FD") on September 29, 2003, denying the Employer's application for labor certification. (AF 12-14). The CO noted the error in the year of the telephone contacts in the Employer's rebuttal statement. The CO

found, however, that even if the year was corrected to 2002, two attempted telephone calls when there was no answer could not be considered evidence of a sufficient attempt to contact the applicant. The CO noted that the applicant provided two telephone numbers on his resume. The Employer's rebuttal statement did not show which number was called on either day. The CO concluded that the Employer had failed to provide information sufficient to document how the Employer rejected the U.S. applicant solely for job related reasons and denied the application. (AF 12-14)

By letter dated October 6, 2003, the Employer requested review by this Board. (AF 1). The Employer argued that the certified letter was returned marked "attempted – not known" and "no such number." The Employer stated that this letter indicated the applicant had perhaps moved without leaving a forwarding address. In addition, the Employer argued that the telephone calls made at 3:00 and 4:00 p.m. were made at a time appropriate for an unemployed person.

DISCUSSION

In *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991), this Board outlined what elements are needed in a recruitment report to establish proper attempts to contact U.S. applicants. In general, the report must indicate what attempts the employer made to contact the applicants and include details such as: 1) when or how many times it attempted to contact the applicants by phone; 2) whether the attempted contacts were made to the applicants' place of business or homes; 3) with whom a message was left, if any, and what the message was; and 4) whether the employer attempted alternative means of communication. In this matter, the Employer stated on rebuttal that in addition to the certified letter which was returned unclaimed, the Employer attempted to call the U.S. applicant two times. The Employer did not, however, identify which of the two numbers listed on the U.S. applicant's resume were called. Two attempts to call one of the numbers provided by the applicant when the applicant also provided another phone number is an insufficient attempt to contact the applicant. *Bay Area Women's Resource Center,* 1988-INA-379 (May 26, 1989) (*en banc*).

The Employer's failure to pursue the alternative phone number, and to call at other times of the day (both calls were made at similar times of day) does not constitute a reasonable effort to contact the U.S. applicant. The Employer's failure to provide documentation that the U.S. applicant was contacted in a timely fashion after the receipt of the resume indicates a failure to recruit in good faith. *See Loma Linda Foods, Inc.,* 1989-INA-289 (Nov. 26, 1989) (*en banc*).

In the light of the foregoing, we find that the CO properly found that the Employer has not established that he put forth an adequate, good faith effort to contact the U.S. applicant in a timely manner. The Employer's rejection of the U.S. applicant without making a reasonable effort to contact the applicant is an unlawful rejection and the CO properly denied certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs